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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

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THE CITY OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

March 4, 1943.

Thomas D. Thacher,
Corporation Counsel of the City of New York.

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Citations.

Other Authorities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Corporation Counsel of the City of New York, on behalf of the above named Petitioner, a municipal corporation organized and existing under and by virtue of the laws of the State of New York and exercising by virtue of said laws, powers of government over the people of said City, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit requiring the cause between the above entitled parties to be certified to this Court for determination by it.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. §347(a). The final judgment of the Circuit Court of Appeals for the Second Circuit

was entered December 26, 1942, and this petition was filed within three months thereafter.

Opinions Below.

The opinion of the District Court is reported in 45 F. Supp. 226 and is printed at page 384 of the Record. The opinion of the Circuit Court of Appeals is reported in 131 F. 2d 909 and is printed at page 414 of the Record.

Questions Presented.

(1) Whether there was any agreement between the parties.

(2) If there was, was it a valid and enforceable agreement notwithstanding the failure to comply with express requirements of the Charter of the City of New York governing the purchase of real estate by the City.

(3) Was it intended by the Act of the Legislature of the State of New York entitled "An Act authorizing the City of New York to sell and convey to the United States government certain real property within the borough of Manhattan of such city",

> (*a*) to ratify a prior agreement for the purchase of other real estate which was invalid because of failure to comply with the City Charter or
>
> (*b*) to authorize ratification of said invalid agreement by any other agency.

(4) Whether, if given such effect, it is invalid under the Constitution of the State of New York, Art. III, §16 (now §15).

Provision of the State Constitution Involved.

Art. III, §16 (now §15) of the Constitution of the State of New York provides as follows:

> "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

Statutes Involved.

(1)

Various provisions of the Greater New York Charter are pertinent on the question of the invalidity of the so-called agreement. These provisions are summarized with citations in the appendix (p. 14, *infra*).

The many careful safeguards contained in the Charter should be considered as there set forth but the following provisions show the requirements applicable to the acquisition by purchase of sites for public parks and playgrounds.

§ 442a (added by Local Law No. 7 of 1929) provides:

> "Notwithstanding any provision of the Greater New York Charter or any other statute the Comptroller of the City of New York with the approval of the board of estimate and apportionment of said City, and the separate approval of the Mayor is hereby authorized to select sites for public parks and playgrounds in any borough of the City of New York and acquire by purchase or condemnation the property so selected * * *."

§226 provides:

> "Except as otherwise specifically provided, every act of the board of estimate and apportionment shall

be by resolution adopted by a majority of the whole number of votes authorized by this section to be cast by said board. * * * No resolution or amendment of any resolution shall be passed at the same meeting at which it is originally presented unless twelve votes shall be cast for its adoption."

The record contains no resolution of the Board of Estimate and Apportionment.

(2)

The Enabling Act, N. Y. Sess. L. 1931, ch. 39, reads thus (R. 150-151):

"AN ACT authorizing the City of New York to sell and convey to the United States government certain real property within the borough of Manhattan of such city

Became a law February 27, 1931, with the approval of the Governor. Passed, on emergency message by a two-thirds vote

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The city of New York is hereby authorized to sell and convey to the United States government such lands and premises and rights and easements therein located in the area bounded by Foley park; Park street; Pearl street; New street and Duane street in the borough of Manhattan, city of New York, owned by the city of New York as may be required by the United States government.

§2. Such sale and conveyance shall be on such conditions and such terms as in the judgment of the commissioners of the sinking fund shall be deemed proper.

§3. The land so transferred to be used by the United States government for the construction and erection of a new federal court house in and for the southern district of New York, in connection with an agreement between the city of New York and the United States government for the removal of the old federal building at the southerly end of City Hall park in the borough of Manhattan, and the acquisition of a new site in said borough by the United States government for the construction and erection of a new post office building.

§4. This act shall take effect immediately."

(3)

The Act of Congress (46 Stat. 901) on which the Secretary of the Treasury relied for power to enter into the so-called "agreement" with the City to sell the old court house and post office site reads thus (R. 120):

"In lieu of the alternate provisions contained in the act approved March 4, 1929, for the acquisition of a site to accommodate either the post office, Federal courts, etc., or a site for a building to accommodate the Federal courts, the Secretary of the Treasury is hereby authorized, after the receipt by him of an acceptable offer by the city of New York for the purchase of the courthouse and post office property at Park Row and Broadway, to acquire by purchase, condemnation, or otherwise, the block bounded by Barclay, Vesey and Church Streets and West Broadway, for a site for a building for post office and other Government offices, at a total estimated limit of cost for said site of not to exceed $5,000,000, and a site for a building for the accommodation of the Federal courts at a total estimated limit of cost for said site of not to exceed $2,450,000 and to procure by con-

tract preliminary sketches of said courthouse building developed sufficiently for use as a basis for estimates; the cost of said sketches to be paid from appropriations available for the purpose."

Statement.

In the District Court the United States (plaintiff below) alleged that an agreement had been made between the parties to the effect that the City would purchase the federal court house and post office site in City Hall Park, New York City, from the United States, and that in consideration of the sale the City (1) would pay such part of the cost of a new post office site as the area of the old site bore to the new, and (2) would sell to the United States of America a new court house site in Foley Square for $2,450,000.

Fearful of reliance upon letters exchanged between the Mayor and the Secretary of the Treasury without action by the Board of Estimate and Apportionment necessary under the Charter to establish an agreement binding upon the City, plaintiff went on to allege that the Enabling Act (N. Y. Sess. L. 1931, ch. 39) which authorized the City to sell the Foley Square site (which it owned) to the United States had also ratified an agreement to purchase the site of the old Post Office in City Hall Park. But this Act was passed to authorize the future sale of lands, and could not operate to ratify the past ineffective contract to buy the old site in City Hall Park. Specific performance was prayed for.

The City denied that any binding agreement had ever been entered into; and asserted (R. 14) that if the Enabling Act embraced the ratification of an invalid contract, it was void as contravening N. Y. Const. (1894), Art. III §16 (now §15), which provides:

> "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

The title of the Enabling Act was (R. 150):

> "An Act authorizing the City of New York to sell and convey to the United States government certain real property within the borough of Manhattan of such city."

Yet the Court below has concluded that, under that title, the Commissioners of the Sinking Fund were authorized to consummate a purchase of real property. This conclusion upon which the decision now rests plainly ignores the Constitution of the State.

The District Court found for the plaintiff, and a decree of specific performance was entered. 45 F. Supp. 226. The City was ordered to complete the purchase of the land in question and to pay the Government $4,288,856.66 with interest from October 30, 1937. In its opinion the District Court found the contract valid *ab initio* notwithstanding failure to comply with the Greater New York Charter. Presumptions were relied on to supply proof that essential steps had been taken, whereas the law of the State is that compliance with the Charter provisions must clearly appear.

Defendant appealed to the Circuit Court of Appeals, which entered a judgment of affirmance. 131 F. 2d 909. Although the District Court's finding of compliance with the Charter predicated solely upon presumptions with no proof of any resolution of the Board of Estimate and Apportionment was rejected as improper by the court below and with it the District Court's conclusion of validity *ab initio*, yet the City was held bound because, in the court's

opinion, the Enabling Act above referred to operated to ratify, or to confer on the Commissioners of the Sinking Fund power to ratify, a previously invalid and unenforceable "agreement". The court below said (R. 429-430):

> "Public policy requires that municipal corporations be bound by contracts made by those who undertake to represent them only when such contracts are in fact duly authorized. *Seif* v. *City of Long Beach,* 286 N. Y. 382; 36 N. E. (2d) 630; *Scarborough Properties Corp.* v. *Village of Briarcliff Manor,* 278 N. Y. 370, 16 N. E. (2d) 369. When the due authorization of such a contract is in issue it simply begs the question to presume regularity when the prescribed course has not been followed. Actual and adequate proof that the Board of Estimate and Apportionment did suspend its rules to enable it to act in secret, or so-called executive, session was needed to support the contract's validity in so far as it was dependent upon action by that body."*

Had the court below stopped here, your petitioner would have prevailed. But the court then concluded that the Enabling Act (quoted at pp. 4-5, *supra*) dispensed with action by the Board of Estimate and Apportionment, adding (R. 430-431):

> "In § 3 of the special law it was made clear that the sale of this land to the government was 'in connection with an agreement' for the removal of the old post office building and the acquisition by the govern-

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* It was also necessary to prove that the Board of Estimate and Apportionment, whether acting in executive session or not, did act by adopting a resolution supported by a majority of votes. The best evidence of the adoption of a resolution is the record. No such evidence nor indeed any evidence that any resolution was adopted is in the record.

ment of a new site for the erection of a new post office building. This special act superseded the city's charter, itself but a legislative act subject to amendment by the legislature, *pro hac vice* and gave the commissioners of the sinking fund ample authority to authorize, as they did, the contract under which the sale of the civic center site to the government was made under the terms of the contract for acquisition by the city of the old post office site. The cash paid by the government was not all that it paid for the civic center site. The agreement to relinquish its right to use the old post office site was a part of the consideration. Nor was the city for that entire consideration merely to convey the court house site to the government. It was as a part of the same transaction to pay the government the amount involved in this suit. This was the agreement the commissioners of the sinking fund duly approved and ratified as a part of the terms and conditions of the sale of the civic center site. It was clearly within their power under the special act so to do when that act was passed, as it was, by a two-thirds vote of both houses on an emergency message of the governor."

Three features of the Enabling Act show the distortion of its purposes by the decision below: it gave (1) authority (2) at a future date (3) to sell certain lands. Despite this purpose to which the Act was limited by its own terms, the Circuit Court of Appeals held it was (1) a ratification (direct or vicarious) of a (2) past agreement (3) to buy certain other and different lands.

The decisions of the two courts below were in effect the same. By improper presumptions the District Court found that the Board of Estimate and Apportionment had acted as required although it may only act by Resolution and none

was produced. The Circuit Court of Appeals misconstrued a Special Act embracing but one subject as embracing two where but one was expressed in the title. The Special Act so construed would be unconstitutional. It was not susceptible of the construction necessary to give validity to the agreement upon which the suit is founded. Whichever judgment stands we submit the courts below have quite unwarrantedly set aside the safeguards surrounding the disposition which can lawfully be made of the funds of the City in the purchase of real estate. This presents a question of great importance to the government of the City and of the State of New York.

In *Williams* v. *City of New York*, 118 App. Div. 756 (1st Dept., 1907), affd. without opinion 192 N. Y. 541 (1908), the Court, in dwelling on the need of exacting strict compliance with the forms of law before imposing contractual liability upon the City, said (p. 763):

> "The strict provisions of the Consolidation Act, re-enacted in the charter, were the outgrowth of the experiences of the city a little over a generation ago when its finances were unblushingly and almost openly looted by a conspiracy between public officials and their favored contractors. What has once happened may be repeated.
>
> While in the case at bar there is no suggestion of fraud or impropriety, good motives in the particular case furnish no grounds for weakening the defenses against possible fraud."

Specification of Errors to be Urged.

Your petitioner submits that the Circuit Court of Appeals (*a*) erred in holding that the City of New York was legally bound to purchase the old court house and post

office site in City Hall Park; (*b*) erred in holding that the Enabling Act ratified, or authorized the ratification of, an "agreement" void when made for want of compliance with the Charter; (*c*) erred in failing to hold that the Enabling Act as construed by the court was invalid under Art. III, §16 (now §15) of the State Constitution; (*d*) erred in requiring specific performance of the alleged agreement and (*e*) erred in failing to dismiss the complaint.

Reasons for Allowance of Writ.

The decision of the court below presents an important and serious question of public law. It construes a state statute in such a manner as to render it unconstitutional under the Constitution of the state. It ignores the invalidity of the statute thus construed and predicates judgment on the statute in derogation of the constitutional limitation. All this notwithstanding the fact that the express terms of the statute are open to no such misinterpretation as that adopted in the court below. In this process of error the court below has ignored the policy of the local laws as declared by the highest court of the State and promulgated in its decisions.

This Court has recognized that it is purely a question of local policy of each state to determine the extent and character of the powers which its various political and municipal organizations shall possess and the manner and form in which such powers shall be exercised.

Claiborne County v. *Brooks,* 111 U. S. 400, 410 (1884);

Detroit v. *Osborn,* 135 U. S. 492, 498 (1890).

In suits between the United States and municipalities of the states this rule is strictly enforced in the federal courts against the Government.

> *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F. 2d 911 (8th Cir., 1935);*
> *Alameda County* v. *United States,* 124 F. 2d, 611, 617 (9th Cir., 1941).

The court below ignored the rule firmly established in New York that legislative ratification of what was previously unlawful must be found in plain language and cannot be left to uncertain implication.

> *Cox* v. *Mayor of New York,* 103 N. Y. 519, 526 (1886);
> *Matter of Dean,* 230 N. Y. 1, 7 (1920);
> *Kingsley* v. *City of Brooklyn,* 78 N. Y. 200, 206 (1879).

This policy is recognized in the legislative practice of the State. Care is taken to include clear and unequivocal expressions of approval and validation when enacting special acts to cure the illegality of some past transaction. In fact the 1931 Legislature which passed the Enabling Act with which we are concerned used the opening phrase "An Act to legalize * * *" on 17 different occasions. A complete list of legalizing acts is found at page 1973 of the bound volume of session laws for 1931. Quite significantly the Enabling Act on which the Government relies (L. 1931, ch. 39) is not among them.

There is no language importing legislative ratification in the Act. Indeed, there is nothing in the Act to support the

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* A portion of the opinion affecting a companion case was later withdrawn without affecting or modifying the portion of the same opinion which dealt with the *City of Kennett* case. 80 F. 2d 520 (8th Circ., 1935).

conclusion of the court below. Nor does it authorize the Commissioners of the Sinking Fund to ratify any previously invalid agreements.

The need of exacting strict compliance with all the forms of law before imposing contractual liability upon a municipality has often been emphasized in the decisions of the courts of the State.

Williams v. *City of New York,* 118 App. Div. 756, 763 (1st Dept., 1907), aff'd without opinion, 192 N. Y. 541 (1908);

Scarborough Properties Corp. v. *Village of Briarcliff Manor,* 278 N. Y. 370, 375-376 (1938).

See also:

Hepburn v. *Philadelphia,* 149 Pa. St. 335, 339-340, 24 Atl. 279 (1892).

The decision of the court below is in conflict with the State Constitution and with the decisions of the highest court of the State construing and enforcing Article III, §16 (now §15) of the New York State Constitution.

Gaynor v. *Village of Port Chester,* 231 N. Y. 451, 453 (1921);

Matter of Dean, 230 N. Y. 1, 6-7 (1920);

Parfitt v. *Furguson,* 159 N. Y. 111, 116-117 (1899).

Wherefore it is respectfully submitted that this petition should be granted.

March 4, 1943.

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Corporation Counsel of the City of
New York.